

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DIANNE L. KELLEY and KENNETH  
HANSEN,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington  
Corporation,

Defendant.

NO. C07-0475 MJP

PLAINTIFFS' RESPONSE TO  
MICROSOFT'S MOTION TO SEAL

CLASS ACTION

NOTE ON MOTION CALENDAR:  
October 5, 2007

Microsoft filed a motion to seal on September 14, 2007. Dkt. 45. In its motion, Microsoft identified the documents it wants the Court to seal, *id.*, but deferred its attempt to make the showing required under CR 5(g)(2)—i.e., “a clear statement of the facts justifying a seal and overcoming the strong presumption in favor of public access”—until this past Monday evening (three days ago) when it filed supplemental papers. Dkt. 53-54. With Microsoft’s “clear statement” now in hand, plaintiffs submit the following as to each document Microsoft wishes to have sealed:

PLAINTIFFS' RESPONSE TO MICROSOFT'S MOTION TO  
SEAL - 1  
No. C07-0475 MJP

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1 **A. Exhibit A to Supplemental Wilner Declaration: Excerpts of the Rule 30(b)(6)**  
2 **Deposition of Christine Mullaney Sundlie**  
3

4 On September 13, 2007, Microsoft emailed us a "DRAFT" set of confidentiality  
5  
6 designations for the 30(b)(6) deposition of Christine Mullaney Sundlie that was taken on August  
7  
8 29, 2007. Assuming the "draft" to be the "final," Microsoft acknowledges that pages 54-57 do  
9  
10 not need to be sealed. The remainder of pages pertain to terms of agreements between Microsoft  
11  
12 and OEMs, all of which, to one degree or another, relate to the Microsoft's Windows Vista  
13  
14 Capable Marketing Program. That program is now completed by its own terms. The testimony  
15  
16 thus relates to what is now an outdated marketing program and, accordingly, does not appear to  
17  
18 have the level of "commercial sensitivity" that Microsoft would have the Court believe. See  
19  
20 Dkt. 54. Given that the useful life of the program has long since passed, plaintiffs do not believe  
21  
22 that Microsoft has provided sufficient justification for this testimony to be sealed.  
23

24 **B. Exhibit B to Supplemental Wilner Declaration: Excerpts of Microsoft's OEM**  
25 **Marketing Bulletin**  
26

27 Likewise, the same Windows Vista Capable Marketing Program that the OEM Marketing  
28  
29 Bulletin describes is no longer in existence. Microsoft's only argument for sealing is that, while  
30  
31 the program was in effect, Microsoft and the various OEMs to which the bulletin was sent  
32  
33 treated the bulletin as confidential pursuant to a non-disclosure agreement. Dkt. 54 ¶ 12; Dkt. 53  
34  
35 at 4. A party's own attempt at maintaining confidentiality cannot alone be sufficient to pass the  
36  
37 test for sealing documents when filed in court. As such, plaintiffs do not believe that Microsoft  
38  
39 has provided sufficient justification for this document to be sealed.  
40  
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45

**C. Exhibit C to Supplemental Wilner Declaration: Excerpts of a Draft Marketing Agreement**

This document is a draft of an agreement. Microsoft does not explain why a draft—which presumably was never used as such—is “commercially sensitive” and “is of significant competitive value to Microsoft.” Dkt. 54 ¶ 4. Although Microsoft states that it goes to great lengths to prevent its agreements with OEMs from being made public, those efforts alone cannot be a surrogate for whether the document (in this case, a draft) should be sealed in the court file. Accordingly, plaintiffs do not believe that Microsoft has provided sufficient justification for this document to be sealed.

**D. Exhibit D to Supplemental Wilner Declaration: 12/27/01 Microsoft Letter**

Plaintiffs do not object to this document being sealed.

**E. Exhibit F to Supplemental Wilner Declaration: Excerpt From Microsoft Desktop Operating System License Agreement for OEMs**

This is a form agreement with no OEM named. As noted on MS-KELL 187, the agreement has expired by its own terms. Plaintiffs do not believe that Microsoft has provided sufficient justification for this document to be sealed.

**F. Plaintiffs’ Reply in Support of Motion to Compel**

Microsoft’s proposes that “only a few sentences” need be redacted from plaintiffs’ reply, but does not say which sentences to which it refers. “Only a few sentences” is less than all sentences in which plaintiffs quoted from the exhibits Microsoft deems confidential. In any event, the quotations from these exhibits have been truncated and, in our view, lack sufficient context to render them of any material importance to Microsoft’s competitors. See Reply at 2, 4. Accordingly, plaintiffs do not believe that Microsoft has provided sufficient justification for plaintiffs’ reply to be either sealed in whole or redacted in part.

1 DATED this 4th day of October, 2007.

2  
3 **GORDON TILDEN THOMAS & CORDELL LLP**

4  
5  
6  
7 By 

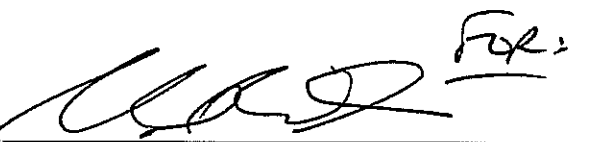
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9 Jeffrey M. Thomas, WSBA #21175

10 Michael Rosenberger, WSBA #17730

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14  
15  
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18 William C. Smart, WSBA #8192

19 Ian S. Birk, WSBA #31431

20  
21 Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on October 4, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following.

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